UNITED STATES
v.
VERNON W. CLIFTON

IBLA 74-5 Decided January 9, 1974

Appeal from decision (Arizona A-6299) by Administrative Law Judge Graydon E. Holt, declaring mining claims null and void.

Affirmed.

Administrative Procedure: Burden of Proof--Mining Claims: Contests

> Where a mining claimant shows the presence of some copper within his mining claims, but does not demonstrate by a preponderance of evidence that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine, his claim is properly declared null and void for lack of a discovery.

Mining Claims: Discovery: Geologic Inference

> Geologic inference may be relied upon to establish the extent and potential value of a particular mineral deposit, but it may not be relied upon as a substitute for the actual finding of a mineral deposit within the limits of a mining claim. Even if it could be geologically inferred that greater values of copper might be found below the surface exposures of a lode, such an inference would not establish a discovery in the absence of a showing of the physical existence of such mineralization.

Mining Claims: Hearings--Rules of Practice: Evidence

> Evidence tendered on appeal to the Board of Land Appeals after a hearing has been held in a mining contest cannot be considered and weighed with the evidence presented at the hearing in making a decision on the merits of the contest since the record made at the hearing constitutes the sole basis for decision; however, such evidence may be considered in determining whether there is any justification for ordering a further hearing in the case.

APPEARANCES: Vernon W. Clifton, pro se.; Fritz L. Goreham, Esq., Office of the Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for appellee.

OPINION BY MR. FISHMAN

Vernon W. Clifton has appealed from a decision by Administrative Law Judge Graydon E. Holt, dated June 6, 1973, declaring 60 lode mining claims null and void. 1/

On July 2, 1971, a complaint (Arizona Contest No. A-6299) was served on Vernon W. Clifton and Cora Jenkins challenging the validity of the mining claims in issue. The claims are located in T. 3 N., R. 6 W., G.S.R. Mer., Maricopa County, Arizona. The contest was initiated on behalf of the Bureau of Reclamation which has jurisdiction over part of the land pursuant to the Central Arizona Project (Withdrawals A-997 and AR-031307). The complaint charged that the land embraced within the limits of the claims was nonmineral in character and that a discovery within the meaning of the mining laws had not been demonstrated on any of the claims. Cora Jenkins did not file an answer to the complaint. The Judge accordingly treated the allegations of the complaint as admitted by Jenkins, and her interest in the claims was declared null and void. 43 CFR 4.450.7(a). Clifton answered the complaint generally denying the charges as they related to the Blue Knobb claims. He asserted no interest in the Lucky Knob claims in either his answer or at the

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1/ The claims, as described in the complaint, are known as the Lucky Knob Nos. 1 through 20, the Lucky Knob Nos. 1 through 4 (Cora), the Blue Knobb Nos. 1 through 11, the Blue Knobb Nos. 13 through 18, and the Blue Knobb Nos. 20 through 40.

hearing. The Judge, in his decision of June 6, 1973, declared the Lucky Knob claims null and void, and appellant does not challenge the decision insofar as it relates to the Lucky Knob claims. The appeal before us is only made with respect to the Blue Knobb lode claims.

Appellant argues that the Government failed to prove a prima facie case that "formations within boundaries of the Blue Knobb claims will not enrich to commercial copper." He asserts that the Government failed to establish that a prudent man would not develop the claims, and that he in fact made a valuable discovery on the Blue Knobb claims. He contends that the land in issue was not withdrawn for the Central Arizona Project at the time he made his "discoveries." Appellant further asserts that his assay results demonstrate a valuable discovery of copper and contends that the United States and large mining companies in competition with him are attempting to take the claims away from him because "open pit copper mineralization occurs in [his] discovery pits." Finally, appellant asserts that the land withdrawn for the Central Arizona Project unnecessarily includes the lands on which he has located his lode claims.

The Blue Knobb claims were located in 1957 and 1964. The withdrawal of land for the Central Arizona Project occurred after the time of location of the Blue Knobb claims. Appellant's rights to the claims, therefore, are superior to those of the Bureau of Reclamation under the withdrawals, only if appellant made a discovery of a valuable mineral deposit within the meaning of the mining laws prior to the date of withdrawal. See United States v. Henry, 10 IBLA 195 (1973); Wesley Laubscher, 4 IBLA 246 (1972).

A mining claim unsupported by a discovery of a valuable mineral deposit is null and void. United States v. Goodpaster, 13 IBLA 281 (1973); 30 U.S.C. § 23 (1970). In determining whether a claimant has discovered a valuable mineral deposit, the Department has employed, with judicial approval, the prudent man test. Under this test a discovery exists "where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine." Castle v. Womble, 19 L.D. 455, 457 (1894); United States v. Coleman, 390 U.S. 599 (1968); United States v. Zuber, 13 IBLA 193 (1973). The Government has by practice assumed the burden of going forward with competent evidence to show that there has been no discovery of a valuable mineral deposit. The mining claimant then has the burden of establishing by a preponderance of evidence that a discovery

exists on his claim. Foster v. Seaton, 271 F.2d 836 (D. C. Cir. 1959); United States v. Harper, 8 IBLA 357 (1972). In the case at bar, the Government established a prima facie case through the testimony of Charles W. McQueen, a qualified mineral examiner. He testified that he examined the claims on four separate occasions in 1971 (Tr. 19, 29, 40, 42). An attempt was made to conduct a joint examination and sampling of the claims but appellant was unable to attend (Tr. 28-29). McQueen took seven samples (Government Exhibits H, I, J, K, L, M) from the lands included within the area of the Blue Knobb claims as described in the location notices. The assay reports admitted in evidence (Government Exhibits N, O) showed the percentage of copper in the samples as follows:

| SAMPLES | PERCENTAGE OF COPPER |
|---|---|
| BK-1 | 0.012 |
| BK-2 | 0.02 |
| BK-3 | 0.007 |
| BK-4 | 0.29 |
| BK-5 | 0.16 |
| BK-6 | 0.73 |
| BK-7 | 0.38 |

The mineral examiner testified that the percentage figures represented "that portion of a ton of material that would theoretically be pure copper" (Tr. 44). He stated that the values were "very, very low" (Tr. 44) and that the figures might "give rise to further investigations for value" but that no decision to develop a mine would be predicated on the assay results (Tr. 45).

This evidence was sufficient to support a prima facie case of no discovery. Appellant, in an effort to overcome the Government's case, testified that he educated himself in mineralogy (Tr. 53). Based upon his knowledge he theorized that vast quantities of copper ore existed beneath the surface of his claims at the water table which he estimated to be 125 to 200 feet below the surface. Appellant also offered into evidence two samples of ore, one from the Blue Knobb No. 25 (Contestee's Exhibit No. 7) and the other from the Blue Knobb No. 30 (Contestee's Exhibit No. 6). He stated that he had a chip from Exhibit 6 assayed and that the assay results showed six percent copper and four ounces of silver per ton (Tr. 59). Appellant, however, did not introduce any assay reports at the hearing to corroborate his testimony.

On examination by the Judge, appellant was asked whether he would characterize his activities on the claim as exploration work. He stated:

> All of my work is exploration work without being into the mining operations, yes. I don't have the vein into commercial ore, I mean, I am developing a valid claim to proceed to patent in order to begin mining operations.
>
> I am still in the exploration stage. I'm just concluding that. I am now at the point of sinking a shaft into sulfide zone and begin mining operations. (Tr. 72)

In our view appellant's evidence was insufficient to establish a discovery on any of the claims. Where, as here, a mining claimant has located a group of claims, he must demonstrate a discovery on each claim located to satisfy the requirements of the mining laws. United States v. Block, 12 IBLA 393, 80 I.D. 571 (1973); United States v. Bunkowski, 5 IBLA 102, 79 I.D. 43 (1972). Appellant only offered samples from two of his claims. Moreover, at the hearing he did not offer into evidence any assay reports to demonstrate the quantity or quality of mineralization on any of his claims. His testimony that vast quantities of copper ore exist beneath the surface does not meet the requirement of a discovery. Geologic inference may be relied upon to establish the extent and potential value of a particular mineral deposit, but it may not be relied upon as a substitute for the actual finding of a mineral deposit within the limits of a claim. Even if it could be geologically inferred that greater values of copper might be found below the surface exposures of appellant's lode claims, such an inference would not establish a discovery in the absence of a showing of the physical existence of such mineralization. United States v. Bartels, 6 IBLA 124 (1972); United States v. Coston, A-30835 (February 23, 1968). The work appellant performed on his claims was essentially exploratory in nature. While his efforts demonstrated that further exploration was warranted, the Department has held that evidence of mineralization which is only sufficient to warrant further exploration is insufficient to establish a discovery under the mining laws. United States v. New Mexico Mines, Inc., 3 IBLA 101 (1971); see Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969).

Appellant has submitted on appeal additional assay certificates which purport to show significant copper values for several samples. One certificate, dated February 17, 1973, shows the percentage of copper per ton of the material assayed to be 17.8 per cent. All of the samples reflected in the July 9, 1973, certificate were taken from sites outside of the boundaries of the mining claims. See

Gov. Ex. D. With respect to the certificate dated February 17, 1973, no showing has been made as to who took the sample, whether the sample was taken from rock in place, i.e. a vein, or, on the other hand, whether they merely represent a grab sample, float, or stringer. Such samples do not command substantial evidentiary weight. United States v. Guthrie, 5 IBLA 303 (1972); see United States v. Avgeris, 8 IBLA 316 (1972).

Evidence tendered on appeal in a mining contest may not be considered except for the limited purpose of deciding whether there is any justification for ordering a further hearing, since the record made at a hearing must be the sole basis for decision. United States v. Zweifel, 11 IBLA 53, 80 I.D. 323 (1973); 43 CFR 4.24. In the case at bar, no justification has been shown for granting a further hearing.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Frederick Fishman, Member

We concur:

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Martin Ritvo, Member

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Joan B. Thompson, Member